No. 86-1871

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

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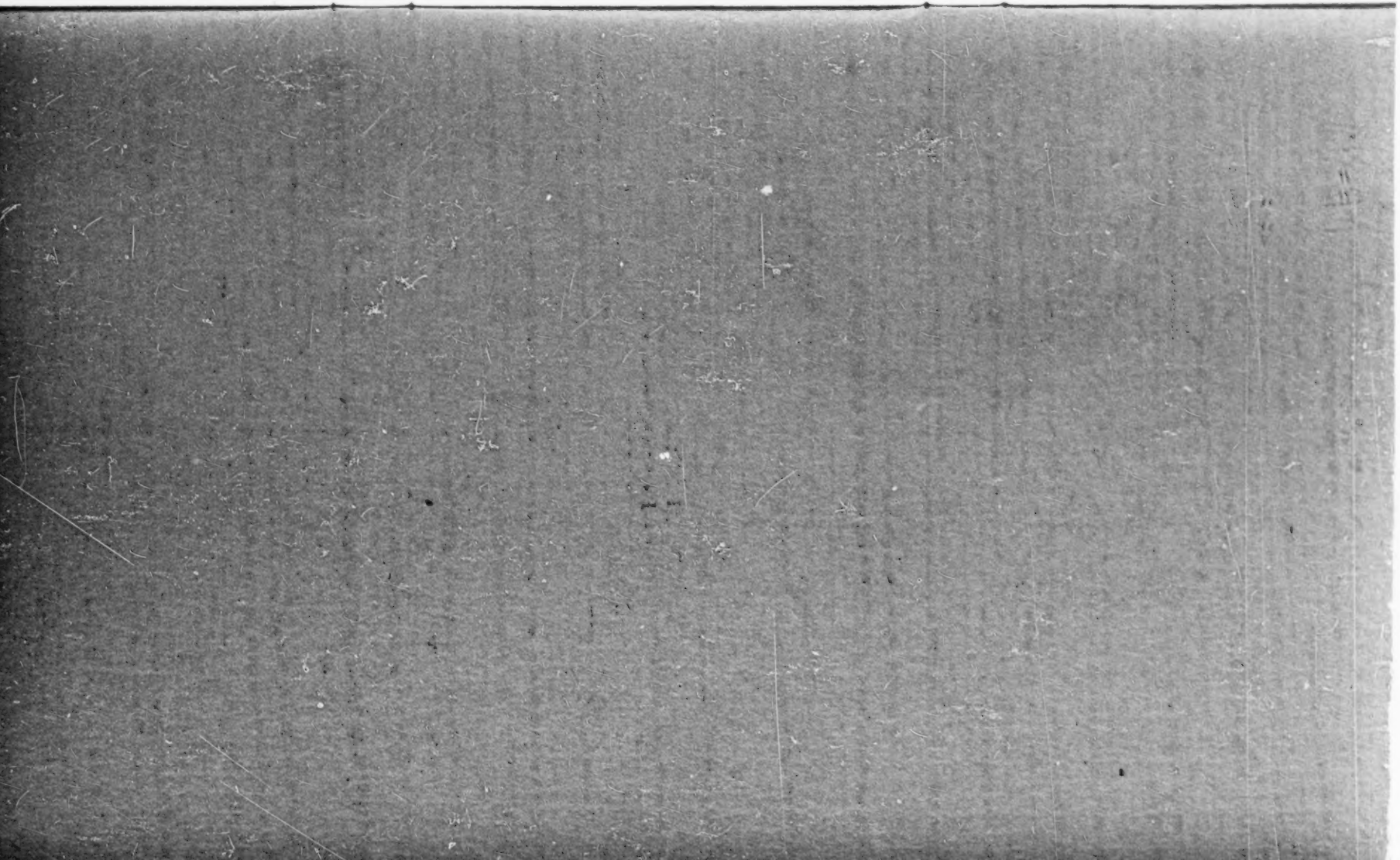

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The intervenor-respondent, Public Service Commission of the State of New York ("New York"), opposes the petition filed by National Fuel Gas Supply Corporation ("petitioner") seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *National Fuel Gas Supply Corporation* v. *Federal Energy Regulatory Commission,* 811 F.2d 1563 (1987); Petitioner's Appendix 1a (hereinafter "Pet. App.").

REASONS FOR DENYING THE WRIT

Both the court below and the Federal Energy Regulatory Commission ("Commission") rejected petitioner's attempt to reprice retroactively the gas it had produced and sold under previously-approved cost-of-service rates to the higher rates available under the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301-§ 3342. Both the Commission (Pet. App. 23a-24a) and the court (Pet. App. 1a-22a) found that the Commission's 1979 order approving cost-of-service rates for this gas and the 1981 settlement agreement resolving subsequent rate increases on the basis of a continuation of the cost-of-service treatment, in both cases without reserving a right to seek a higher price for the gas should it be

determined in pending litigation that pipelines had a right to such higher prices, precluded the retroactive repricing of this gas.

Petitioner offers three arguments as reasons for granting its petition: (1) the Commission unlawfuly impeded what petitioner views as the unconditional authorization of the NGPA to price the gas at issue at the higher rates it sought; (2) the decision of the court below conflicts with a decision of the Fifth Circuit; and (3) the court improperly gave deference to the Commission's interpretation of a settlement agreement. As will be demonstrated, none of these reasons warrant this Court's plenary review. Instead, this case addresses a specific factual situation, involving particular settlement language, which is of no future significance in the administration of the Natural Gas Act or Natural Gas Policy Act and of no intrinsic importance which would warrant this Court's review.

1. Petitoner argues that the decision below and the Commission's underlying rulings reflect a "steadfast refusal to implement the NGPA consistent with the provisions of the statue and this Court's *Mid-La* [*Public Service Commission of the State of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983)] decision." Petition at 14. Petitioner's contention rests upon the erroneous premise that the Commission was required to price all pipeline production since 1978 at NGPA ceiling prices, regardless of whether the pipeline had agreed to, or accepted lower prices for such gas in intervening rate proceedings.

The court below rejected petitioner's contention. It found no reason to suspect "the Commission has embarked on a deliberate program to sabotage the [NGPA's] provisions or to refuse to carry its mandate." Pet. App. 7a. The court below viewed this Court's *Mid-La* decision as overturning a Commission error of "interpretation" of the NGPA's application to a pipeline's own production which did not resquire retroactive modification of "all of the final rate orders that have been entered over the years since the [NGPA] was enacted." *Id.* This is consistent with normal practice "that a judicial decision should be given prospective effect." *Id.*

Petitoner suggests (petition at 13-14) that the Commission improperly imposed an *ex post facto* condition, *i.e.*, preservation of a pipeline's rights in intervening rate cases, before pipeline production can be priced at NGPA rates. As the court below noted (Pet. App. 7a), the NGPA does not mandate the unqualified application of its ceiling prices in all circumstances. Under the NGPA, parties can still bargain for less than ceiling prices. The Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 780 F.2d

1238, 1242 (1986), similarly recognized that a settlement agreement could expressly bar recovery of NGPA pricing for pipeline production:

> The dispositive issue in this case is whether the 1981 Commission-approved settlement between Mid Louisiana and its customers should be read to preclude Mid Louisana from repricing "old" pipeline production according to the rates allowable under the NGPA.

Accord, Consolidated Gas Supply Corp. v. *FERC*, 745 F.2d 281 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

2. Petitioner asserts that the Fifth Circuit's *Mid Louisiana Gas Co.* decision conflicts with the decision below, even though in both cases "the salient operative facts are identical." Petition at 14. There is no conflict, however, on any question of law. Both courts took the same approach of reviewing the underlying settlement agreement to determine the rights, if any, of the pipeline to reprice its own production at NGPA ceiling prices. The courts reached different conclusions not because of different views as to the governing law, but because their analyses of the separate underlying settlement agreements reached different conclusions.

Contrary to petitioner's assertion (Petition at 15), both courts agreed that a general disclaimer was insufficient by itself to perserve a right to reprice company production. The Fifth Circuit stated, and the court below agreed (Pet. App. 20a), "we are unpersuaded that these provisions of the settlement agreement were specific enough to constitute express references to Mid Louisiana's right to reprice its pipeline production in the event it prevailed in the *Mid-La* litigation." 780 F.2d at 1244.

The court's results differed to the extent that settlement provisions and the surrounding facts differed. *Compare* 780 F.2d at 1244-45 *with* Pet. App. 18a-21a. But even if the two courts had reached divergent conclusions in construing essentially similar fact situations, this would not be a basis for granting the petition. Plenary review by this Court is not warranted merely because the circuits reach contrary determinations as to the meaning of comparable facts, absent a showing — which cannot be made in the instant case — that the underlying issue is one of future significance or national importance.

3. Petitioner asserts that the court below misapplied the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it gave deference to the Commission's decision.

(Petition at 20-24)[1] Petitioner claims that deference should not be given to the Commission's interpretation of the settlement agreement because the Commission, through its staff, was an interested party to the settlement, or because it was biased by its prior position in the *Mid-La* litigation and so interpreted the settlement in a way that "effectively breathed new life into the Commission's unlawful interpretation of the NGPA" (Petition at 23).

Petitoner's unsupported contention of bias is inconsistent with Commission orders in at least two other cases where pipelines claimed to have reserved the right to reprice their own production in the event of a favorable ruling in the *Mid-La* litigation. *Consolidated Gas Supply Corp.* v. *FERC, supra,* 745 F.2d at 246; *Kentucky West Virginia Gas Co.* v. *FERC,* 780 F.2d 1231, 1234 (5th Cir. 1986). Petitioner misses the point of the Commission orders under review. The Commission's interpretation of its prior orders determining just and reasonable rates or approving settlement agreements with respect to petitioner and other pipelines subsequent to this Court's *Mid-La* decision, *supra,* did not involve the substance of the *Mid-La* controversy, but rather whether the pipelines had reserved the right to reprice the gas in a manner different from that provided in the Commission's orders should the pipeline position prevail in the litigation. Where a reservation was found, repricing was allowed. In those cases where a reservation was not found, repricing was not allowed. The Commission's approach is fully consistent with the *Mid-La* decision and the Commission's statutory duties. *See* Pet. App. 53a-55a (Commission explains its duties in interpreting settlements).

Contrary to petitioner's unsupported assertions (Petition 23-24,) the Commission judged the agreement under established statutory and precedential principals. Pet. App. 53a-59a Because the Commission's actions were well within the boundaries of its statutorily-entrusted responsibilities, the *Chevron* principles were properly applied.

[1]But the court below made clear that it would have reached the same result even if it had not afforded deference to the Commission's interpretation. Pet. App. 18a.

CONCLUSION

For the reasons stated, New York urges the Court to deny the petition.

Respectfully submitted,

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